In the District Court of the United States for the District of Columbia

CIVIL No. 32098

GUSTAFUS V. IVERSEN ET AL., PLAINTIFFS-APPELLANTS.

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL., DEFENDANTS-APPELLEES.

Filed Feb. 13, 1946. Charles E. Stewart, *Clerk.*

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered January 15, 1946, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' com-

[1] An opinion, by Circuit Judge Prettyman, was also filed on January 8, 1946.

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plaint[2] to set aside certain orders of the Interstate Commerce Commission.

The Commission's orders[3] find and declare "that there is a critical shortage of refrigerator cars and that free time published in tariffs for loading and unloading such cars aggravates the shortage thereof"; that "carload shipments of perishables are being held at points in the United States for diversion, reconsignment, or disposition orders, thereby impeding the use, control, supply, movement, distribution, exchange, interchange, and return of cars"; that "refrigerator cars are

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[2] The decree dismissed the complaint and denied the relief prayed for by appellants, except to the extent that temporary relief had been granted by a restraining order issued on December 21, 1945. That exception is not involved in the present appeal.

[3] The complaint attacked Revised Service Order No. 180, dated October 2, 1944, and amendments thereto and revisions thereof, particularly Fourth Revised Service Order No. 180, dated December 7, 1945, effective December 15, 1945, superseding previous revisions and by its terms expiring on February 15, 1946; Service Order No. 394, dated December 7, 1945, effective December 15, 1945, and expiring by its terms on February 15, 1946; Service Order No. 396, dated December 10, 1945, effective December 15, 1945, and expiring by its terms on February 15, 1946. Though not elsewhere mentioned in the complaint, the prayer for relief sought also to enjoin Third Revised Service Order No. 180, dated May 24, 1945. As this order expired by its own terms on December 1, 1945, prior to the filing of the complaint on December 15, 1945, the District Court held that the prayer to enjoin that order was moot. Revised Service Order No. 180, Service Order No. 394, and Service Order No. 396 were amended on February 11, 1946, so that they will not expire until April 15, 1946.

being delayed unduly while held for orders, bills of lading, payment of freight charges, reconsignment, diversion, reshipment, inspection, forwarding directions, loading and unloading, thus impeding and diminishing the use, control, supply, movement, distribution, exchange, interchange, and return of such cars"; that "in the opinion of the Commission an emergency exists requiring immediate action to alleviate the refrigerator car shortage in all sections of the country," and that "an emergency exists in all sections of this country requiring immediate action to prevent a shortage of equipment and congestion of traffic."

Issued for temporary application only, under the emergency provisions of Section 1 (15) of the Interstate Commerce Act, these orders were made upon the Commission's own initiative without complaint, without answer or other formal pleading by the interested carriers and without notice, hearing, or the filing of a report. They directed temporary changes in demurrage rules and charges on refrigerator cars, and provided that the privilege of reconsignment or diversion, as authorized by existing tariffs, should temporarily not be accorded unless promptly availed of.[4]

[4] The effect of Fourth Revised Service Order 180 is to increase the demurrage charges on refrigerator cars to $11 per car per day for the first day after the expiration of the "free time" of two days, beginning at the first 7 a. m. after placement of the car in position for loading and unloading; $22 for the second day; and $44 for each succeeding day. Service

An appeal was allowed on January 25, 1946, and appeal papers were served on January 29, 1946.

Appellants do not challenge the Commission's findings that a critical shortage of refrigerator cars existed and that there was an emergency requiring immediate action to alleviate the shortage and to prevent further shortages and congestion of traffic. Nor do they challenge the reasonableness of the demurrage charges established by the orders. The only question presented is whether the Commission's orders are orders "with respect to car service," and hence authorized by the Commission's emergency powers under Section 1 (15) of the Interstate Commerce Act as amended (49 U. S. C. 1 (15)). Appellants' contention is that the orders here involved are not orders "with respect to car service," but orders relating to "rates, fares and charges," and hence could not be made without notice and hearing. Appellees submit that the statutory provisions regarding rate-making upon which appellants rely are immaterial, inasmuch as the orders in question are orders

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Order No. 394 directs that the carriers shall not allow more than certain specified free time on refrigerator cars held for loading and unloading, *viz.*, 48 hours on domestic commerce and five days on coastwise, intercoastal or foreign commerce, and provides that all Sundays and legal holidays shall be included in computing such free time. Service Order No. 396 provides in effect that the privilege of diversion or reconsignment on perishable traffic (shipped in refrigerator cars) must be availed of within 48 hours, and if not taken within that time it is lost, with the consequence that the combination of locals instead of the through rate shall apply.

"with respect to car service," and therefore are authorized by the terms of Section 1 (15).

That section provides, in substance, that:

> Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have * * * authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, * * * to suspend the operation of any or all rules, regulations, or practices then established with respect to car services.

and

> to make such just and reasonable directions with respect to car service * * * during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people.

The term "car service" is defined by Section 1 (10) of the Act as including,

> the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment.[5]

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[5] The full text of the pertinent portions of Section 1 follows:

(10) The term "car service" in this part shall include the

The car service provisions contained in Section 1 of the Interstate Commerce Act, as amended, were added by the Esch Car Service Act of May 29, 1917, 40 Stat. 101 (65th Cong., 1st Sess., H. R. 328), and subsequently amended to read as at

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use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this part.

(15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may

present by Section 402 of the Transportation Act of February 28, 1920 (41 Stat. 456, 476–7; 66th Cong., 2nd Sess., H. R. 10453).

The legislative history of these provisions[*] makes it clear that the 1920 amendment to the definition of "car service" so as to make it include "special types of equipment" was meant to bring refrigerator cars within the purview of the Commission's power under the car service provisions (59 Cong. Rec. 3263).

The debates in Congress likewise clearly disclose that one of the evils sought to be reached, which contributed to car shortages, was the practice of shippers using the cars for storage, instead of promptly unloading them.

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after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the Commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the Commission shall, under the power herein conferred, direct that such preference or priority be afforded.

[*] The legislative history of the Esch Car Service Act is found in 64th Cong., 2d Sess., H. Rep. 1553; 65th Cong., 1st Sess., H. Rep. 18; 65th Cong., 1st Sess., S. Rep. 43; 55 Cong. Rec. 2018–29, 2631–2, 2699–2701, 2823–4, 2857. Regarding the amendments made by the Transportation Act of 1920, see 66th Cong., 1st Sess., H. Rep. 456, p. 17; 58 Cong. Rec. 8315–6, 8529–31; 59 Cong. Rec. 3263.

In this connection Mr. Esch, the sponsor of the legislation, declared (55 Cong. Rec. 2020–2021):

> Another cause of car shortage is the holding of cars on the part of shippers themselves, using the car as a species of warehouse, instead of promptly unloading it. I think that it is quite a universal evil throughout the United States, but it is due in some measure to the lack of warehouse and elevator facilities at the terminals. * * *
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> Mr. MADDEN. If the gentleman will yield to me, I would like to ask him one question. I would like to ask the gentleman if there is any provision in this bill to compel railroad companies to pay demurrage to the shippers in case they failed to furnish the cars within the time they were required for the shipment of the goods?
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> Mr. ESCH. The gentleman means reciprocal demurrage?
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> Mr. MADDEN. This gives the Interstate Commerce Commission the right to authorize them to charge certain demurrage of the shipper if he fails to unload the car. Ought not the shipper to have a claim against the railroad company in case they fail to furnish the cars?
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> Mr. ESCH. I have no doubt under the proposed amendment, in case of emergency, the commission could make any rules or regulations that they saw fit that would promote the transit of freight, because the power is very broad, and necessarily so.

Further on Mr. Esch repeated that, "There ought to be relief by requiring the shippers and consignees to load and unload the freight promptly when cars are given to them." He pointed out that on April 1, 1917, the car shortage was something like 143,000 cars. (55 Cong. Rec. 2023.)

The constitutionality of these emergency provisions, authorizing the Commission to act without notice or hearing, was sustained in *Avent* v. *United States,* 266 U. S. 127, 130, where the Supreme Court, speaking through Mr. Justice Holmes, said:

> The right to come here depends upon the presence of some substantial constitutional question. But so far as such questions are raised we are of opinion that they are not substantial in view of previous decisions. We must take it that an emergency contemplated by the statute existed, as found by the Commission and alleged in the indictment * * * That in such circumstances Congress could require a preference in the order of purposes for which coal should be carried, consistently with the Fifth Amendment. * * * That it can do so without trenching upon the powers reserved to the States seems to us not to need argument. * * * That it [Congress] can give the powers here given to the Commission, if that question is open here, no longer admits of dispute. *Interstate Commerce*

> *Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452. *United States* v. *Grimaud*, 220 U. S. 506. *Pennsylvania R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 133. The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed. [Citing cases.]

The service order sustained in the *Avent* case, issued July 25, 1922, without a hearing, was also upheld in *United States* v. *Koenig Coal Company*, 270 U. S. 512, and *United States* v. *Michigan Portland Cement Company*, 270 U. S. 521.

The scope of the Commission's emergency power under the car service provisions of the Act[7] was also considered by the Supreme Court in *Peoria and Pekin Union Railway Company* v. *United States*, 263 U. S. 528, 532–5. In that case the Commission had undertaken to direct a carrier to continue to interchange freight with another road, and to switch, by its own engines and over its own tracks, freight cars tendered to it by that road. The Court held that switching was a trans-

[7] Neither the service orders here in question nor similar service orders issued during the war were issued under war powers. Congress and the Commission considered the existing powers of the Commission sufficient to deal with any transportation emergency which might arise. Annual reports of the Interstate Commerce Commission for 1939, p. 23; for 1941, pp. 1–6, 126–128; for 1942, pp. 1–6, 15–21; for 1943, pp. 51–55; for 1944, pp. 92–94.

portation service, and that the emergency powers of the Commission under the car service provisions do not include authority to require the performance of such transportation. The Court pointed out that "car service" connotes the use to which the vehicles of transportation are put, not the transportation service rendered by means of them.

Applying the criterion of the *Peoria* case to the case at bar, it is clear that the Commission's orders involved in the present suit must be sustained. They relate, not to the performance of transportation service by means of refrigerator cars, but to the use to which those vehicles are put. The charge for demurrage by the orders prescribed is not a rate payable for the performance of transportation by a carrier; it is rather a payment for detention of the carrier's vehicles, preventing their use in the performance of transportation service for other shippers.[8]

As shown by the authorities reviewed in the District Court's opinion, the imposition of a demurrage charge has traditionally been regarded in the railroad industry as a reasonable rule and regulation with respect to the use of cars, the purpose being to prevent delay in loading and unloading. Demurrage charges have not been considered to

[8] That the *Peoria* case is not to be regarded as restricting the Commission's emergency powers with respect to car service is shown by the discussion of that case in *United States* v. *Michiaan Portland Cement Company*, 270 U. S. 521, 527.

be a revenue-producing measure akin to line-haul rates, but as a deterrent device to prevent undue detention of cars.[9]

For a long period of time the Interstate Commerce Commission has repeatedly referred to demurrage charges as car service rules.[10] Orders of the Commission relating to demurrage have always been entitled "service orders," and are served upon the Car Service Division of the Association of American Railroads, as agent of the railroads subscribing to the car service and per diem agreement. The Uniform Demurrage Code, which has been in effect, as revised from time to time, since 1909, treats demurrage charges as an integral part of the regulations adopted to promote prompt release of cars and to prevent unreasonable detention of equipment. Similar expressions regarding the nature of demurrage charges are found in *Swift & Co.* v. *Hocking Valley Railroad Company,* 243 U. S. 281, and *Pennsylvania Railroad Co.* v. *Kittanning Iron & Steel Mfg. Co.,* 253 U. S. 319.

Demurrage rules and charges are in fact car service rules and charges. For permanent ap-

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[9] Demurrage is not, however, to be regarded as a penalty in the criminal law sense. *Turner Lumber Co.* v. *C. M. & St. P. Railway Co.*, 271 U. S. 259, 262.

[10] Thus in 1907 in *Cudahy Packing Co.* v. *Chicago and Northwestern Railway Company*, 12 I. C. C. 446, the Commission said: "The car-service rules of the defendant provide for a demurrage charge of $1.00 per day if cars are not unloaded within forty-eight hours."

plication they may be fixed by the Commission only after a hearing, in acting under the authority of either Section 1 (14 (a) or Section 15 (1). In the event of "shortage of equipment, congestion of traffic, or other emergency requiring immediate action," increased demurrage charges and more stringent rules may be required for temporary application, as a measure for conserving the car supply and in order to impel prompt loading by the consignor and prompt unloading by the consignee, superseding for the duration of the emergency the regularly applicable rules and charges, without a hearing.

As the District Court correctly concludes:

> Historically, textually, in purpose and in content, they are an integral part of the established rules and regulations relating to the use and movement of cars * * * As an integral part of the rules and regulations in respect to car service, they fall within the provisions of Section 1 (15) of the Interstate Commerce Act. It follows that when an emergency exists, the Commission can, without hearing, issue, effective for a limited time, orders in respect to these charges.

Consequently, it seems plain that the Commission's orders involved in the present suit constitute "just and reasonable directions with respect to car service." Certainly they relate to "the use, control, supply, movement, distribution * * * and return" of refrigerator cars. (Sec. 1 (10), 1 (15).)

One of the several major purposes of the emergency powers of Section 1 (15) was to enable the Commission to take immediate action to alleviate car shortages. Among many factors which may cause or aggravate car shortages is undue delay on the part of shippers in the loading or consignees in unloading carload shipments. Empty cars for loading or loaded cars for unloading are placed upon the consignors' or the consignees' private sidetracks. A free time of 48 hours for loading or unloading is allowed, and this is deemed to be a reasonable time for that purpose. Where a consignor or a consignee takes longer than 48 hours, he is subject to demurrage charges. In normal times or times of car surplus (where the number of available cars equals or exceeds the demands) the demurrage charge is comparatively low. The normal demurrage charges are $2.20 per car per day for the first two days after the expiration of the free time and $5.50 per car per day for each succeeding day (Commission's Answer, par. III). In times of car shortage, the demurrage charges may be increased, as the only practicable means of inducing prompt loading or unloading. By Service Order No. 180 the demurrage charges have been increased and by Service Order No. 394 the free time has been reduced. The purpose of these orders is to help relieve the critical shortage of refrigerator cars now existing. These orders are thus strictly within the purpose of Section 1 (15),

and are also within the letter of that section, because they make "directions with respect to car service," *i. e.*, the "use, control, supply, movement, distribution, exchange, interchange and return of * * * cars." To induce in this manner the prompt loading and unloading of refrigerator cars results in augmentation of the "supply" of such cars, it makes a greater number of cars available for a greater number of shippers, it permits these cars to be "returned" to the loading points more promptly, and facilitates their "distribution" to shippers in various sections of the country, where they are urgently needed, to avoid spoiling of perishable crops.

The temporary increase in demurrage charges which the Commission ordered constitutes a reasonable and appropriate means of performing the duty placed upon the Commission by Congress. *McCulloch* v. *Maryland,* 4 Wheat. 316, 409–410. Unquestionably, if the Commission had issued a more stringent order expressly prohibiting the detention of cars more than 48 hours, instead of merely increasing the demurrage charge payable for such detention, the order would without doubt have been one "with respect to car service." Failure to comply with such an imperative order could have been punished criminally. *Avent* v. *United States,* 266 U. S. 127. If the Commission can thus prohibit detention absolutely, it would seem that it can *a fortiori* resort to the less harsh

remedy of imposing a deterrent but reasonable charge for demurrage.

The fact that demurrage is not specifically mentioned in Section 1 (15) does not indicate a legislative intent to exclude that subject from the scope of the Commission's jurisdiction under that section. *United States* v. *Pennsylvania Railroad Company,* 323 U. S. 612, 616. The Transportation Act of 1920 did not detract from the powers of the Commission under the Esch Car Service Act of 1917. *Ibid,* p. 618. On the contrary, the language added in 1920 enlarged the Commission's powers under Section 1 (15), by expressly providing, with respect to a matter left in doubt by the provisions of the 1917 Act, that directions might be made by the Commission "without regard to ownership as between carriers of locomotives, cars, and other vehicles." These words do not, as appellants argue, indicate that the Commission's functions under that section are confined to issuance of orders relating to detention of cars by carriers and afford no remedy against similar detention by shippers or receivers of freight. The 1917 Act was obviously applicable to shippers and receivers of freight, as well as to carriers, and the legislative history of the 1920 Act shows clearly that the purpose of the words added was to augment rather than to restrict the authority conferred upon the Commission.

Other points urged by appellants require no consideration. The allegations of unconstitution-

ality advanced by appellants amount merely to a restatement in different form of their claim that the Commission acted without statutory authority. *Baltimore & Ohio Railroad Co.* v. *United States,* 305 U. S. 507, 526. Similarly, the argument that the requirements of the Stabilization Act of October 2, 1942 (50 U. S. C. 961), have not been complied with is based upon the assumption that a temporary increase in demurrage charges, in order to induce prompt loading and unloading of cars, and thereby augment the supply thereof, is a rate increase, and not a "direction with respect to car service." The District Court was obviously correct in overruling these subsidiary contentions. And on the controlling issue, as to whether the Commission's orders were orders "with respect to car service," and hence could be made for temporary application only, without hearing in case an emergency was found to exist, the District Court's decision was also clearly right.

For the foregoing reasons, it is respectfully submitted that this appeal presents no substantial question, and that the judgment of the District Court should be affirmed.

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